

Supreme Court of the United States

OCTOBER TERM, 1968

No. 200

BEN H. FRANK,

Petitioner,

—v.—

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Page
Record from the United States District Court for the Western District of Oklahoma	
Docket entries	1
Application for order to show cause why defendant should not be punished for criminal contempt, filed June 16, 1966	10
Order to show cause why defendant should not be punished for criminal contempt and appointing attorneys to prosecute filed June 16, 1966	14
Motion for jury trial filed July 22, 1966	16
Transcript of hearing on contempt, sentencing—July 22, 1966 (excerpt—Denial of oral motion requesting a jury trial)	17
Transcript of hearing—August 19, 1966 (excerpt)—Sentence imposed	21
Judgment—August 19, 1966	23
Order containing conditions of probation filed September 1, 1966	25

	Page
Proceedings in the United States Court of Appeals for the Tenth Circuit	28
Opinion, Breitenstein, J. filed October 26, 1967	28
Judgment, October 26, 1967	31
Order denying petition for rehearing, November 20, 1967	32
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	33

CRIMINAL DOCKET

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CR-66-120

Closed July 25, 1966

THE UNITED STATES \

vs.

BEN H. FRANK

Okla.

Charge: Vio.—Application for order to show cause why
dft should not be punished for criminal
contempt (vio of perm inj in Civ. # 5427,
W. D. of Okla)

Counts:

ATTORNEYS

For U. S.:

Robert L. Berry, Asst USDA, Box 778, O.C.
and

Philip A. Loomis, Jr., Gen. Counsel, Wash., D. C.

O. H. Allred, Regional-SEC Adm., and

D. J. Silman, Atty, 301 US Courthouse, Ft. Worth,
Tex 76102 (SEC)

For Defendant:

Robert Turner, Hightower Bldg., O.C.

Statistical Record

Costs

J.S. 2 mailed 6-30-66

Clerk

J.S. 3 mailed 7-31-66

Marshal

Violation

Docket fee

Title

Sec.

Date	Name or Receipt No.	Disb.	Rec.
7-29-66	Robert J. Turner	5.00	
8-1-66	Dep Tr US CD # 8		5.00
8-30-66	Ben H. Frank	5.00	
8-31-66	Dep Tr US CD # 14		5.00

Date	Proceedings
Jun 16, 1966	Filed Application for order to show cause why dft should not be punished for criminal contempt
Jun 16, 1966	Filed Order that appl. be filed & copy, w/copy of this order, be served upon dft; that dft show cause Jun 27, 1966, 9:30 a.m., why he should not be adjudged in cr. contempt of this court for vio. set forth and punished; that USDA for this district and D. J. Silman, atty for SEC, are apptd & directed to prosecute dft (Bohanon)
Jun 16, 1966	Filed Application for order apptg attys to prosecute
Jun 29, 1966	Filed Marshal's Return on Order to show cause: Served Ben H. Franks personally, Jun 25, 1966 (USM: \$38.20)
Jun 29, 1966	Filed Order directing dft to show cause Jul 20, 1966, 9:30 a.m., why he should not be adjudged in criminal contempt of this court in vio. of judgment, order, and decree of this Court, dated May 21, 1952, being Civ.-5427, more specifically set out in Order of this Court, dated Jun 16, 1966, and further ordering that copy hereof be sent to dft by registered mail by Clerk of Court and that U. S. Marshal serve copy hereof on dft (Bohanon) (cert copy mailed to dft—Clerk)

Date	Proceedings
Jul 11, 1966	<p>Filed praes (2) for and issued subps. D. T. on behalf of plf:</p> <p>For Virgil Howard Oliphant, Mrs. Virgil Howard Oliphant, Albert F. Baker, Sam Mabry, Alfred F. Meyer, Charles A. Barry, Grady A. O'Connor, Muriel A. Amyx & Jerry Zelinka</p> <p>For Victor Simoncic</p>
	<p>Filed praes (2) for and issued subps. D. T. on behalf of plf for:</p> <p>Glenn W. Swihart, William Bohling, Roscoe W. Spencer, Virgil Ray Farr, and Adam LaVon Wafford</p> <p>Frank Mattoon</p>
Jul 18, 1966	<p>Filed prae for and issued subp. D. T. for Bert Wilcox on behalf of plf</p>
Jul 19, 1966	<p>Filed Marshal's Return on Order: Served Ben H. Franks personally Jul 16, 1966 (USM: \$4.48)</p>
Jul 19, 1966	<p>Filed Subps. D. T. (11):</p> <p>Adam LaVon Wafford NOT FOUND Jul 14, 1966, and NOT FOUND Jul 18, 1966 (USM: \$6.96)</p> <p>Served Muriel A. Amyx and Jerry Zelinka personally Jul 14, 1966 (USM: \$9.12)</p> <p>Served Virgil Ray Farr personally Jul 14, 1966 (USM: \$5.20)</p> <p>Served Mr. and Mrs. Virgil Howard Oliphant personally Jul 17, 1966 (USM: \$4.24)</p> <p>Served Frank Mattoon personally Jul 14, 1966 (USM: \$3.00)</p> <p>Served Sam Mabry and Charles A. Barry personally Jul 15, 1966 (USM: \$11.28)</p> <p>Served William Bohling personally Jul 13, 1966 (USM: \$3.00)</p>

Date	Proceedings
Jul 19, 1966	Served Roscoe W. Spencer personally Jul 15, 1966 (USM: \$25.20)
	Served Albert F. Baker personally Jul 12, 1966 (USM: \$17.36)
	Served Grady A. O'Connor personally Jul 12, 1966 (USM: \$2.00)
	Served Alfred F. Meyer personally Jul 12, 1966 (USM: \$2.00)
Jul 21, 1966	Ent Order passing case to Jul 22, 1966, 10:00 a.m.; Marshal to pick up dft and bring him to Okla. City to be examined by Dr. Charles Wilson (Bohanon)
Jul 22, 1966	Ent Hearing re order to show cause: Dft appears in person and by counsel, Robert Turner; dft's motion for continuance & motion for jury demand both overruled after testimony of dft and plf's atty, Silman; rule invoked; plf presents case in chief, offering testimony of witnesses and exhibits 1 - 39 admitted; cont'd to Jul 25, 1966, 9:30 a.m.; dft allowed to remain in custody of his counsel (Bohanon)
Jul 22, 1966	Filed dft's motion for jury trial
Jul 22, 1966	Filed dft's motion for continuance
Jul 25, 1966	Ent Further Nonjury Trial: Parties appear as heretofore; dft's testimony offered, and dft's exhibits 1 - 7 admitted; Court finds dft guilty, suspends imposition of sentence and places dft on probation for 3 years; plf to prepare order re general and special orders of Court (Bohanon)
Jul 25, 1966	Filed Order of Judgment & Probation (Bohanon) (CROB # 28)
Jul 27, 1966	Filed Subps. D.T. (2): Served Glen W. Swihart personally Jul 13, 1966 (USM: \$19.68) Served Victor Simoncic personally Jul 18, 1966 (USM: \$34.44)

Date

Proceedings

- Jul 26, 1966 Filed Reporter's transcript of Court's findings, probation, and conditions thereof taken Jul 25, 1966
- Jul 27, 1966 Filed Bench Warrant: Arrested Ben H. Frank and transported him to office of Dr. W. Tom Johnson, M. D., for physical exam, after which he was committed to Okla. County Jail in lieu of \$5000 bond on Jul 21, 1966
- Jul 27, 1966 Filed Order of Probation w/special instructions enjoining dft from selling any interest in O&G properties in vio. of rules of SEC, finding dft guilty and placing him on probation for 3 years, ordering US Marshal in Tulsa to serve copy hereof personally on dft and make return thereon, and ordering that any further proceedings herein shall be heard in N. D. of Okla. (Bohanon) (CROB. # 28) (2 certs mailed to USM, Tulsa)
- Jul 29, 1966 Filed deft's Notice of appeal, in duplicate, from judgment and order of probation ent. July 25, 1966. Copy of Notice mailed to Robert L. Berry this date. Transcript of record due in CCofA on Sept. 7, 1966. ((Copy of notice also mailed to Mr. Philip A. Loomis, Jr. & to D. J. Silman.) Duplicate Notice of Appeal and cert. copy of docket sheet mailed to Court of Appeals.)
- Aug 1, 1966 Filed copy of letter from Clerk to counsel in re docketing appeal)
- Aug 8, 1966 Filed letter from deft. to Clerk ordering reporter's transcript of record, and statement as to documents to be included in record. Copy of letter and telegram (received 8-5-66) mailed to Mr. Frank Sickles, Reporter

Date

Proceedings

- Aug 10, 1966 Filed MOTION of plf to re-sentence the defendant for reason he was not given the right of allocution.
- Aug 10, 1966 Filed ORDER that deft and his attorney appear before this Court Aug. 19, 1966 at 10:00 a.m. for purpose of re-sentencing in accordance with Rule 35 of Fed. Rules of Cr. Procedure: ordered that a copy of this order be served personally on the deft. by the U.S. Marshal. (Bohanon)
- Aug 16, 1966 Filed Marshal's Return of Service of Order: Served Ben H. Frank personally Aug 14, 1966 (USM: \$6.64)
- Aug 16, 1966 Filed Marshal's Return of Service of Order: Served Ben H. Frank personally Aug 14, 1966 (USM: \$4.00)
- Aug 19, 1966, Ent Resentencing: Dft appears in person and by counsel; Court sets aside order of probation of 7-25-66, but not the finding of guilt of dft; dft is asked if he has anything to say and, nothing to the contrary appearing, it is judgment of Court that dft be placed on probation for 3 years from this date, suspending sentence; order filed 7-27-66 reinstated, as to part of restrictions of dft; Mr. Turner allowed to withdraw as dft's counsel (Bohanon)
- Aug 19, 1966 Filed Miskovsky, Sullivan, Embry, Miskovsky & Turner's Motion to withdraw as dft's attys
- Aug 19, 1966 Filed Order granting firm of Miskovsky, et al., leave to withdraw as dft's attys (Bohanon)
- Aug 19, 1966 Filed Order of Judgment & Probation (Bohanon) (CROB # 28)
- Aug 29, 1966 Filed dft's Notice of Appeal from order of judgment & sentence Aug 19, 1966 (transcript of record due in CCofA Oct 8, 1966)

- Aug 31, 1966 Mailed copy of notice of appeal to Robert L. Berry, Philip A. Loomis, Jr., and D. J. Silman
- Aug 31, 1966 Filed copy of letter to counsel from clerk re appeal (copy to appellant, also)
- Aug 31, 1966 Mailed copy of last page of docket sheet to all parties
- Sep 1, 1966 Filed Order that dft shall not directly or indirectly purchase in any paper at anytime re development of oil properties in Montgomery County, Kansas, particularly in either the Tulsa World, Tulsa Tribune, or Oklahoma City papers; dft shall report to Chief Probation Officer at Tulsa, Okla., Mr. Howard Scott on Monday of ea week in writing or orally as may be required by the Probation Officer, and upon failure to make these reports, Court will be advised; dft is further enjoined from attempting to make any sales, borrow any money from anyone on 10-year notes or any note or giving stock by contract for purpose of selling any int in purported oil properties w/o compliance w/SEC regulations; that usual & normal rules of probation shall apply to dft; dft is further enjoined & restrained from selling any int by himself, thru his brother or any of his partners or Progress Oil and Mining Co. or any other company in O&G properties in violation of rules of SEC; dft is at liberty to make applications to SEC for sale of securities, but must proceed in compliance w/rules of SEC; that sentence imposed in this case is suspended & dft placed on probation for 3 years subject to provisions herein set forth; that Clerk of Court serve copy hereof upon dft by Reg. Mail, ret. receipt requested; that further proceedings herein be heard in N. D. of Okla. (Bohanon) (CROB #28) (Copy hereof mailed by Reg. Mail—VE)

Date

Proceedings

- Oct 18, 1966 Filed Order extending time to Dec 1, 1966, in which to docket appeal (Bohanon) (cert cc to CCofA; USDA notified) Order dated Oct. 8, 1966
- Nov 28, 1966 Filed Order extending time to Jan 10, 1967, to file & docket appeal (Bohanon) (cert copy to CCofA; atty notified)
- Jan 5, 1967 Filed Order extending time to Jan. 20, 1967, in which to docket appeal (Bohanon) (cert copy to CCofA; parties notified)
- Jan 6, 1967 Filed Stipulation between parties re record on appeal
- Jan 16, 1967 Filed Certificate of appellant's counsel that record is correct for purposes of appeal-w/s
- Jan 17, 1967 Mailed documents in lieu of record on appeal to CCofA this date. (Fee: \$11) (copy of index & transmittal letter to attys; copy of transmittal letter to Probation Office)
- Feb 2, 1967 Filed Order granting Robt. L. Berry permission to withdraw exhibits as described herein for purpose of photostating (Bohanon) Exhibits RETURNED this date
- Aug 2, 1967 Filed letter from USCofA requesting transmittal of record on appeal
- Aug 8, 1967 Filed letter from Clerk transmitting record on appeal. (Copy to counsel of record) VE
- Dec 5, 1967 Filed copy of Opinion (Miller, Breitenstein & Seth)
- Dec 8, 1967 Received Mandate from CCofA (Judgment of this Ct. affirmed) (Mandate referred to Judge Bohanon)

Date

Proceedings

- Dec 8, 1967 Ent Order directing Clerk to file Mandate from CCofA (Bohanon)
- Dec 8, 1967 Filed Mandate from 10th USCGofA (Judgment & Sentence of Dist. Ct. affirmed) (Miller, Breitenstein, & Seth) (No costs shown)
- Jan-25, 1968 Filed copy of letter from Clerk, USCoFA to Judge Bohanon that U.S. Supreme granted petition for certiorari herein June 17, 1968.—copy mailed to Mr. Berry Asst US Atty - ro

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Criminal Contempt No. CR-66-120

UNITED STATES, PLAINTIFF

v.

BEN H. FRANK, DEFENDANT

APPLICATION FOR ORDER TO SHOW CAUSE WHY
DEFENDANT SHOULD NOT BE PUNISHED
FOR CRIMINAL CONTEMPT—Filed June 16, 1966

TO THE HONORABLE JUDGE OF SAID COURT:

The United States Attorney for this District, and the Securities and Exchange Commission file this application for the institution of criminal contempt proceedings against the defendant and respectfully show as follows:

1. On April 16, 1952, the Securities and Exchange Commission filed in this court a complaint entitled "Securities and Exchange Commission, plaintiff v. Ben H. Frank, et al., defendants," under Civil Action File No. 5427. Said complaint demanded that a preliminary and final injunction issue against the defendant, Ben H. Frank, enjoining him from violating Sections 5 and 17 of the Securities Act of 1933 (15 U.S.C. 77e and 77q).

2. On May 9, 1952, this court issued a decree in said action preliminarily enjoining the defendant from such violations.

3. On May 21, 1952, this court ordered the aforesaid preliminary injunction made permanent, and issued a final judgment, order and decree permanently enjoining the defendant from such violations. A copy of said decree is attached hereto, marked Exhibit A, and made a part hereof.

4. On June 4, 1952, a certified copy of such decree was served upon the defendant, Ben H. Frank, as will

8

appear from the U. S. Marshal's Return of service on file in said Civil Action File No. 5427.

5. The papers, records, and proceedings in the aforementioned Civil Action File No. 5427 are incorporated herein by reference.

6. The defendant Ben H. Frank has wilfully disobeyed such judgment, order, and decree, in criminal contempt of this court and of the lawful authority of the United States, in that, notwithstanding notice of said decree, instead of ceasing and desisting from engaging in the acts and practices forbidden by such decree, he has continued to engage in such acts and practices which constitute violations of Sections 5 and 17 of the Securities Act of 1933 (15 U.S.C. 77e and 77q) in the manner hereinafter more particularly described.

7. Since prior to December, 1961, and continuing thereafter until the present, the defendant has sold securities, namely, notes, investment contracts, and profit sharing agreements relating to oil and gas leases covering lands located in Montgomery County, Kansas, and during this time no registration statement has been filed or was in effect with the Securities and Exchange Commission as to such securities.

8. In the offer and sale of the above securities, the defendant obtained money or property by making statements and omitting to state material facts, prohibited by the judgment of injunction, concerning:

(a) The efficiency and accuracy of a device he called his magnetic logger and its ability to locate oil pools or sands, determine their depth, size, and ability to produce oil in commercial quantities before any oil well is begun;

(b) The number, type, location and size of oil pools or sands encountered by wells already drilled by defendant, and the amount of oil he expects to be produced or recovered therefrom;

(c) A comparison between an alleged oil structure or sand discovered by defendant underlying his leases in Montgomery County, Kansas, and the famous Oklahoma City oil field;

(d) The large profits to be realized by the investor from a small investment in defendant's enterprise;

(e) The payment of the note defendant gave the investor to evidence the investment and to secure it and make it safe;

(f) The fact that defendant had drilled dry holes on his Montgomery County, Kansas, leases, that others had also drilled dry holes in this area, and that there were no producing wells in the vicinity of these leases, so that the investment being solicited involved a "wildcat" well and was highly speculative.

9. In engaging in the acts and practices described in paragraphs 7 and 8, defendant made use of the means and instrumentalities of interstate commerce and of the mails.

10. Attached hereto are seven affidavits in support of the allegations contained in paragraphs 7, 8, and 9, marked Exhibits B through H, inclusive, which are made a part hereof.

11. No registration statement with respect to such securities has ever been filed with the Securities and Exchange Commission; and the sale of such securities is not exempt from the provisions of the Securities Act of 1933 either by its terms or pursuant to any rules or regulations of the Securities and Exchange Commission promulgated thereunder. There is attached hereto, marked Exhibit I and made a part hereof, a certificate by the proper official of the Securities and Exchange Commission, showing that no registration statement with respect to such securities has ever been filed.

12. The acts and practices described above were committed by the defendant wilfully, subsequent to, and with knowledge of, this court's judgment, order, and decree; and by such conduct the said Ben H. Frank has wilfully, in criminal contempt of this court, disobeyed and defied the aforesaid lawful judgment, order, and decree of this court.

WHEREFORE, Applicants request:

(1) That an Order issue from this Court, directed to the said Ben H. Frank, requiring him to show cause, if

any he has, at such time and place as seems proper to this Court, why he should not be punished for criminal contempt of this Court for violation of and disobedience to the aforesaid judgment, order, and decree of this Court, dated May 21, 1952, in Civil Action File No. 5427.

(2) That upon the return of such Order to Show Cause, the same be made absolute, and the said Ben H. Frank be adjudged in criminal contempt of this Court and that he be punished in such manner as the Court may deem proper.

B. ANDREW POTTER
United States Attorney

/s/ Robert L. Berry
Assistant United States Attorney

SECURITIES AND EXCHANGE
COMMISSION

PHILIP A. LOOMIS, JR.
General Counsel
Washington, D. C.

O. H. ALLRED
Regional Administrator

/s/ D. J. Silman
Attorney
301 United States Court House
Fort Worth, Texas 76102

Date: June 16, 1966

1334 South Quaker—Tulsa, Okla.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CR-66-120

UNITED STATES, PLAINTIFF

v.

BEN H. FRANK, DEFENDANT

ORDER TO SHOW CAUSE WHY DEFENDANT SHOULD NOT
BE PUNISHED FOR CRIMINAL CONTEMPT, AND
APPOINTING ATTORNEYS TO PROSECUTE—

Filed June 16, 1966

It appearing to the court, on examination of the application for an order to show cause, and the affidavits in support thereof, and the attestation of nonregistration, that reasonable cause exists for believing that Ben H. Frank has wilfully violated and disobeyed the judgment, order, and decree issued by this court, dated May 21, 1952, in the cause entitled "Securities and Exchange Commission, plaintiff v. Ben H. Frank, et al., defendants," Civil Action File No. 5427, and is guilty of criminal contempt as indicated in the application annexed hereto:

NOW THEREFORE IT IS ORDERED, ADJUDGED, AND DECREED:

(1) That the application be filed and a copy of same, together with a copy of this order, be served upon the said Ben H. Frank.

(2) That the said Ben H. Frank show cause before me, if any he has, on the 27th day of June, 1966, in my courtroom in the Federal Courthouse Building, 200 N. W. 4th Street, Oklahoma City, Oklahoma, at 9:30 A.M., or as soon thereafter as he may be heard, why he should not be adjudged in criminal contempt of this court for

violation of and disobedience to the judgment, order and decree of this court, dated May 21, 1952, in the cause entitled "Securities and Exchange Commission, plaintiff v. Ben H. Frank, et al., defendants," Civil Action File No. 5427, as charged more specifically in the application attached hereto, and punished accordingly.

(3) That the United States Attorney for this district and his assistants, and D. J. Silman, attorney for the Securities and Exchange Commission, be and they are hereby appointed and directed to prosecute the defendant, Ben H. Frank, on behalf of this court.

LUTHER BOHANON
United States District Judge

DATE: June 16, 1966

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

No. CR-66-120

UNITED STATES, PLAINTIFF

-vs.-

BEN H. FRANK, DEFENDANT

MOTION FOR JURY TRIAL—Filed 7/22/66

**COMES NOW the defendant, BEN H. FRANK, and
makes demand for a jury trial in the above styled case.**

**BEN H. FRANK
Defendant**

By:

**MISKOVSKY, SULLIVAN,
EMBRY, MISKOVSKY &
TURNER**

**By: /s/ Robert J. Turner
Attorneys for Defendant**

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 66-120 (Cr.)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

BEN H. FRANK, DEFENDANT

BEFORE:

HONORABLE LUTHER BOHANON
United States District Judge
Northern, Eastern & Western Districts of Oklahoma

TRANSCRIPT OF PROCEEDINGS AT HEARING ON CONTEMPT,
SENTENCING AND FURTHER WITH REFERENCE
TO SENTENCING

Oklahoma City, Oklahoma

PROCEEDINGS

[3]

July 22, 1966

THE COURT: The next case on the docket is the
United States versus Ben H. Frank.

MR. TURNER: If the Court please, at this time I
would ask leave of the Court to file two written motions.

THE COURT: Very well.

MR. TURNER: For the purpose of protecting the
record.

THE COURT: Very well.

MR. TURNER: The first motion relates to a request for a continuance. The second motion relates to a request for a jury trial.

We would further request that the Court permit us to put on a witness in support of the motion for a continuance.

THE COURT: What says the District Attorney?

MR. BERRY: Well, if the Court please, we are ready for trial. We recognize that the rules provide for continuances but we think this matter should be tried at this time, without further evidence. I haven't read the motion, however.

THE COURT: Yes, Mr. Berry.

MR. BERRY: If the Court please, I have now read this motion for a continuance. I think this is a matter that was discussed by this Court yesterday and I see no necessity for the ground raised in that motion that any [4] evidence need be introduced. We are ready to proceed to trial.

THE COURT: Well, I haven't had a chance to read it. Let me read it.

Well, I am quite concerned about the defendant's right for a jury trial.

MR. BERRY: Well, if the Court please, I'd like to give the Court the provisions of 3691 Title 18 U. S. Code.

THE COURT: 3691?

MR. BERRY: Yes, sir.

THE COURT: Title 18?

MR. BERRY: Yes, sir.

THE COURT: Read it to me.

MR. BERRY: (Reading) "Whenever a contempt charge shall consist of wilful disobedience of any lawful writ, process, order, rule, decree or command of any District Court of the United States, by doing or omitting any act or thing in violation thereof and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress or under the laws of any state in which it was done or omitted, the accused upon demand therefor shall be entitled to a trial by jury."

Then the second section goes down further and states this, "This section shall not apply to contempts committed

in the presence of the Court or so near thereto as to obstruct the administration of justice, nor contempts committed in disobedience of any lawful writ, process, order, rule, decree or command entered in any suit or action brought or prosecuted in the name or on behalf of the United States."

And this is an order that was made by this Court, an injunction permanently enjoining this defendant from engaging in certain types and kinds of business; and that's exactly what the exception in this statute provides for.

THE COURT: Let me ask Mr. Turner, what do you have to say about that, Mr. Turner?

MR. TURNER: My only comment to that, if the Court please, would be that that last paragraph relates back to the injunction and the suit in that case was brought by the SEC; not the United States, and I will contend that is a separate body able to be sued in its own name and independently of the United States, and this refers back to that action, not to a contempt matter, and consequently they are entitled to a jury trial.

This matter of course is in sort of a gray area and I am making my demand because it is in that gray area for the purposes of protecting the record.

THE COURT: Yes. Well, the record would be protected with or without it under the rules but I believe it is my duty.

Now then, going back to the motion for a continuance, the record shows that this defendant was served in June. [6] He waited twenty days to contact your firm, Mr. Turner, and two day later your firm accepted the employment and that was the 18th day and you have not had an opportunity to acquaint yourself with it and fully discuss with the defendant the merits of his defense, but you don't say why. What was it—from the 18th to today; what is today?

MR. TURNER: Today is the 22nd, I believe.

THE COURT: Why have you been unable to talk to him about it? He has been furnished with the complaint, attached to the complaint are many affidavits, many exhibits, which are self evident. Have you had an opportunity to read the complaint?

MR. TURNER: Yes, sir.

THE COURT: Or a copy of the complaint?

MR. TURNER: Yes, sir.

THE COURT: Did you not find the complaint rather full and complete?

MR. TURNER: I was capable of comprehending it and I understood what it was intended to allege. Now that doesn't mean, however, that I am familiar with all of the rules and regulations of the SEC or criminal contempt matters or, for example, whether or not he is entitled to a jury trial. I just haven't had enough time to research this case.

THE COURT: Well, the Court doesn't find there is anything difficult, there is nothing complex about a case [7] like this at all. It's just a question of whether or not he has violated the order of Judge Wallace.

My thought in this matter is to deny a trial by jury and inasmuch as the Government has gone to a considerable amount of expense, the witnesses are here and they were here yesterday; and the attitude of this defendant has been something other than proper. I think the Court will go ahead and hear these witnesses. Then I will continue that for a reasonable time to let you find out what witnesses you want, and examine these witnesses in relation to what they have to say, and the Court will continue it. These witnesses will be through. We can call them back if it is necessary, for further examination, and you will let the District Attorney know which witnesses you will want.

That will give you an opportunity to call your witnesses without calling these witnesses back any more, and let them testify with reference to whatever witnesses you might have.

Now does that sound fair to you?

MR. TURNER: I appreciate the consideration of the Court. I would like, however, to take exception to your rulings, overruling my motions.

THE COURT: Yes, I understand that.

* * * *

5

[93]

PROCEEDINGS

August 19, 1966

THE COURT: We have on the docket this morning the case of the United States versus Ben Frank.

MR. TURNER: If the Court please, the defendant is here as ordered by the Court.

THE COURT: Fine.

This matter, Mr. Turner, has been passed on heretofore but the purpose of this order, the last order in this case was that after the trial in this case the Court proceeded to and did find the defendant guilty and I did not give you, Mr. Turner, nor did I give the defendant an opportunity to say anything as to why the Court should not then pronounce sentence, which was an error.

I knew it at the time but having in mind what I thought I should do in the case and then also having heard Mr. Frank for some 20 or 30 minutes, I didn't think that it would be necessary to call upon him to say anything; and I was in error.

But the Court does now set aside the order placing the defendant on probation for three years, set that order aside. I do not set aside the findings of guilt.

Now that the order is set aside and held for naught, the Court now calls upon you before the Court pronounces [94] sentence and asks you if you have anything to say. The Court will be glad to hear you as to why sentence should not now be pronounced or anything in the way of mitigation.

MR. TURNER: If the Court please, I will make the first remarks and I will make two brief remarks.

Number one, I feel obligated to appear for Mr. Frank for the purpose of resentencing. However, I will ask the Court to permit me to withdraw after his resentencing.

Number two, I hope we are here simply to correct a technical error and not to increase or to aggravate the punishment. I think the reasons given by the Court for his punishment were sound, his age and approaching

sinility. He may not appreciate the punishment rendered by the Court. It may be for those reasons, and if the evidence is that at a later date the Court will have to take stronger steps, but in my opinion it would be tragic. He would suffer more than his just deserts to be incarcerated here in the closing phase of his cycle here on this earth.

THE COURT: Do you care to make a comment?

DEFENDANT FRANK: I want to thank your Honor for the opportunity to say a few words. I want to thank you for listening to my statement which contains all I wished to say on the subject and I have nothing further to say except to thank you for correcting the technical error.

THE COURT: Well, fine. I want to thank you, Mr. [95] Turner, for coming up here. It was a technical error but it is an error that before the matter could be passed on officially or if it was passed on officially by the appellate court, such an error that it would reverse the sentence and I just shouldn't let the record go up without it being corrected.

So now then, having specifically complied with the technicalities in this law, the Court will now pronounce sentence in this case and the sentence is as stated on the 25th of July, that is, the Court suspends sentence in this case and places the defendant on probation for a period of three years from this date, and as a part of the probation, the defendant is enjoined and restrained from putting any advertisements soliciting investors in any oil project he may have, directly or indirectly, any place in the nation including Montgomery County, Kansas, I believe it's Montgomery County specifically; and specifically the "Tulsa World" and "Tulsa Tribune" and other places where through these ads he made the entree to people to put their money into his venture.

He is further restrained and enjoined from giving notes, ten year notes, to these investors and all the other things that were set out in the order before.

The probation officer in charge of this probation problem will be Mr. Howard Scott, the Chief Probation Officer at Tulsa, because the defendant lives there and it will be

more convenient. The defendant shall report weekly on [96] Monday of each week his activities of the previous week. He shall not leave town without permission of the probation officer and such other rules that the probation officer may find appropriate under all the circumstances in this case.

The order will be perfected and a copy of it, the order here given, will be furnished to you and to Mr. Frank, too.

Very well.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 66-120-Criminal

UNITED STATES OF AMERICA

v.

BEN H. FRANK

JUDGMENT—August 19, 1966

On this 19th day of August, 1966, came the attorney for the government and the defendant appeared in person, and¹ by his attorney, Robert J. Turner, Esq.

IT IS ORDERED that the Judgment and Order of Probation ordered filed and entered on July 25, 1966, is hereby vacated and set aside.

IT IS ADJUDGED that the defendant has been convicted upon his plea of² not guilty and a finding by the Court of guilty of the offense of violating the judgment issued by this Court, dated May 21, 1952, in the cause entitled Securities & Exchange Commission vs. Ben H. Frank, et al, Civil action No. 5427, all as charged in the

Order to show cause why defendant should not be punished for criminal contempt, filed in this Court on June 16, 1966.

as charged *

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that * imposition of sentence be suspended and the defendant is hereby placed on probation for a period of three (3) years from this date.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ LUTHER BOHANON
United States District Judge
VERA L. HOWARD
Clerk

By /s/ [Illegible]
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Criminal No. 66-120

UNITED STATES OF AMERICA, PLAINTIFF

-vs.-

BEN H. FRANK, DEFENDANT

ORDER—Filed September 1, 1966

This matter comes on for hearing as to the resentencing of the defendant, Ben H. Frank, pursuant to Order of this Court dated and filed on August 10, 1966.

The defendant appeared in person and by his attorney, Robert J. Turner, and the plaintiff, United States of America being represented by David A. Kline, Assistant United States Attorney. The Court, after having reviewed the files and proceedings is of the opinion that the sentence heretofore imposed by this Court upon the defendant, Ben H. Frank, should be vacated and that the defendant, Ben H. Frank, should be resentenced, and the defendant and his counsel were so advised. Thereupon, the Court advised the defendant personally and his counsel if they had any statements to make and if either of them knew of any reason why the defendant should not be resentenced. Both the defendant and his counsel made brief statements to the Court.

Thereafter the Court adjudged and resentenced defendant, Ben H. Frank, for violation of the Restraining Order issued in Civil action No. 5427 of this Court, signed by United States District Judge W. R. Wallace and filed in this Court on May 22, 1952. And the Court as penalty therefor suspends the imposition of sentence and the defendant is placed on probation for a period of three (3) years from this date, and the extra conditions of said probation are as follows:

It is ordered that the defendant, Ben H. Frank, shall not directly or indirectly put ads in any paper anywhere

at anytime with reference to the development of oil properties in Montgomery County, Kansas particularly in either the Tulsa World, Tulsa Tribune or Oklahoma City papers; that the defendant, as a further condition of probation, shall report to the Chief Probation Officer at Tulsa, Oklahoma, Mr. Howard Scott, on Monday of each week in writing or orally as may be required by the Probation Officer, as to what his activities had been during the preceding week and upon failure to make these reports all as required by the Probation Officer, and the Court will be advised by the Probation Officer, as to any breach or noncompliance with conditions of this probation. The Court further enjoins the defendant from attempting to make any sales, borrow any money from anyone on ten year notes or any note or the giving of stock by contract or otherwise as the evidence shows that the defendant has done in this matter for purpose of selling any interest in purported oil properties without compliance with S.E.C. law and regulations, upon the breach of any of these provisions of probation the Court shall determine what further action should be taken.

IT IS FURTHER ORDERED that the usual and normal rules of probation shall apply to the defendant in this case. The defendant is further enjoined and restrained from directly or indirectly selling any interest by himself through his brother, through any of his partners, or through the Progress Oil and Mining Company or any other company from selling of interests in oil and gas properties which is in violation of the law or rules and regulations of the Securities and Exchange Commission. That the defendant is at liberty and may at any, and all times to make such applications in proper form to the Securities and Exchange Commission for the sale of securities but must proceed with the sale thereof by compliance with the law, rules and regulations of the Securities and Exchange Commission.

IT IS FURTHER ORDERED that since the defendant has been found guilty of violating the Permanent Injunction of this Court in Civil Action No. 5427 dated May 21, 1952 and filed with the Clerk of this Court on May

22, 1952; that the sentence imposed upon the defendant in this case is hereby suspended and the defendant is placed on probation for a period of three (3) years subject to the provisions of probation hereinabove stated.

IT IS FURTHER ORDERED that the Clerk of this Court shall serve a copy of this Order upon the defendant by mailing a copy of this Order by registered mail, return receipt requested, to defendant Ben H. Frank, 1334 South Quaker Street, Tulsa, Oklahoma.

IT IS FURTHER ORDERED that any further proceedings in this case shall be heard in the Northern District of Oklahoma.

/s/ Luther Bohanon
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9234 - SEPTEMBER TERM, 1967

BEN H. FRANK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the Western District of Oklahoma

John B. Ogden for Appellant.

Robert L. Berry, Assistant United States Attorney (B. Andrew Potter, United States Attorney, and Arthur F. Mathews and Richard S. Kraut, Attorneys for United States Securities and Exchange Commission were with him on the brief) for Appellee.

Before WILBUR K. MILLER *, BREITENSTEIN, and SETH
Circuit Judges.

BREITENSTEIN, Circuit Judge.

OPINION—Filed October 26, 1967

After a trial without a jury, the district court found appellant Frank guilty of criminal contempt because of violations of a 1952 order restraining him from the use of interstate facilities in the sale of certain oil interests

* Of the District of Columbia Circuit, sitting by designation.

unless a registration statement was in effect with the Securities and Exchange Commission. The imposition of sentence was suspended for three years and appellant was placed on probation. This appeal followed.

The authority of the United States to bring the criminal contempt charges is questioned because the injunction was obtained by the Securities and Exchange Commission. The application shows that it was brought both by the United States attorney and by the Commission. The action by the United States attorney is authorized by Rule 42(b), F.R. Crim. P. Additionally the court appointed the United States attorney, his assistants, and an attorney for the Securities and Exchange Commission to prosecute the charges. The requirements of the rule were satisfied.

Appellant says that the 1952 injunction is invalid because it enjoins acts that are criminal offenses. This is permissible under the decision in *In re Debs*, 158 U.S. 564, 594. The grant of injunctive relief in an action brought by the Commission is authorized by 15 U.S.C. § 77t(b). Service was had on the appellant who did not contest the action, did not appeal from the judgment entered, and has never sought modification or release of the injunction. When a court has jurisdiction of the subject matter and person, its orders must be obeyed until reversed for error by orderly review.¹ This proceeding presents no jurisdictional issue.

The sufficiency of the evidence is attacked on the ground that the appellant did not sell securities in violation of the injunction but instead borrowed money on the security of promissory notes given by him. Appellant placed advertisements in two Tulsa newspapers having substantial out-of-state circulation and in those advertisements promised extravagant profits. Replies were by mail to an indicated box number. Each investor received a promissory note and contract entitling him to convert the note into shares of Progress Oil & Mining Company. No registration statement was filed with the Commission. After hear-

¹ *Howat v. Kansas*, 258 U.S. 181, 189. See also *United States v. United Mine Workers of America*, 330 U.S. 258, 293.

ing the testimony of investors and of the appellant, the trial court found the appellant had no intention of paying the notes and that the money advanced was an investment in oil and not a loan. In *Securities and Exchange Commission v. C. M. Joiner Leasing Corporation*, 320 U.S. 344, 352-53, the Supreme Court held that in determining whether oil transactions were within the definition of security stated in the Securities Act of 1933, 15 U.S.C. § 77b(1), the test is "what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." The record before us satisfied those tests.

The district court denied appellant's request for a jury trial. The claim that a jury trial is required by 18 U.S.C. § 3691 is without merit. That section provides for jury trials in certain criminal contempt proceedings but exempts contempts "committed in disobedience of any lawful * * * order * * * entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." The charge here is disobedience of a lawful order entered in a suit brought by the Securities and Exchange Commission, an agency of the United States.

In *Cheff v. Schnackenberg*, 384 U.S. 373, the Court upheld the power of a federal court in a criminal contempt proceeding to impose a sentence not exceeding six months without a jury trial or waiver thereof. In so holding the Court pointed out that the constitutional right to jury trial does not attach to petty offenses and that under 18 U.S.C. § 1 a petty offense is a misdemeanor the penalty for which does not exceed six months imprisonment or a \$500 fine or both. In the case at bar the imposition of sentence was suspended and the appellant was placed on probation for three years. Section 3401 relates to petty offenses and says that the "probation laws shall be applicable" thereto. Under 18 U.S.C. § 3651 the maximum period of probation is five years. In the circumstances we believe that the denial of a jury trial was proper and that the judgment is permitted by the *Cheff* decision and the applicable statutes.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

9234

Before Honorable Wilbur K. Miller, Honorable
Jean S. Breitenstein and Honorable Oliver Seth,
Circuit Judges.

BEN H. FRANK, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the Western District of Oklahoma

JUDGMENT—October 26th, 1967

This cause came on to be heard on the transcript of
the record from the United States District Court for the
Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged
by this court that the judgment and sentence of the said
district court in this cause be and the same is hereby
affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

9234

Before Honorable Wilbur K. Miller, Honorable
Jean S. Breitenstein and Honorable Oliver Seth,
Circuit Judges.

BEN H. FRANK, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the Western District of Oklahoma

ORDER DENYING PETITION FOR REHEARING—
November 20th, 1967

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered that the said petition be and the same is hereby denied.

SUPREME COURT OF THE UNITED STATES

No. 1053, Misc., October Term, 1967

BEN H. FRANK, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS AND GRANTING PETITION
FOR WRIT OF CERTIORARI—June 17, 1968

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1538 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.